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IN THE

Supreme Court of the United States

October Term, 1968

No. 470

JANEL SALES CORP. and CARLTON DRUG, INC.,
Petitioners,

v.

LANVIN PARFUMS, INC., by change of name
LANVIN-CHARLES OF THE RITZ, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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September 30, 1968

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Opinions Below

The opinion of the Court of Appeals is reported at 396 F.2d 398 and is printed in the appendix to the petition (1a-18a). The District Court's memorandum opinion is not reported but appears at 19a-31a.

Statutes

Section 1 of the Sherman Act, 26 Stat. 209, 15 U.S.C. §1, provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

Paragraph (5) of the McGuire Act, 66 Stat. 631, 15 U.S.C. §45(a)(5), provides:

> "Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other."

Statement of the Case

These are treble damage actions alleging violation of Section 1 of the Sherman Act. Two of the issues tendered to the District Court are pertinent to consideration of the petition.

Petitioners contended that respondent's fair trading was unlawful because it was a retailer and in competition with them. The District Court interpreted paragraph (5) of the McGuire Act as excepting from the antitrust ex-

emption granted by that statute only executed fair trade contracts (as opposed to non-signer enforcement) between retailers or between persons in competition with each other. A verdict in favor of respondent on this first issue was directed by the District Court on the grounds (1) that there was no evidence of competition between respondent and any retailer who signed its fair trade contract and that any alleged competition with petitioners would not preclude enforcement because they were non-signers, and (2) that on the undisputed evidence respondent's alleged retail sales (amounting to not more than sixty-seven/one hundredths of one percent of its total sales) did not make it a retailer (22a-30a).

On this first issue, the Court of Appeals reversed and remanded, holding that the District Court erred in directing a verdict on both these grounds. The Court of Appeals correctly concluded, as had the District Court (22a-23a), that "if two retailers sign a price maintenance contract, regardless of whether they are competitors, then the contract is within paragraph (5) and, therefore, excluded from McGuire Act immunization * * *" (10a). The Court of Appeals, however, held that whether respondent was a retailer was a question of fact and that the jury should have determined whether respondent's accommodation sales (not those to its own employees, but rather sales to others having some direct personal connection with it) were true retail sales[1] and, if so, whether the quantum of such sales was sufficient to make respondent a retailer. The Court of

1. See *Parke, Davis & Co.* v. *Janel Sales Corp.*, 328 F.2d 105 (2d Cir.), *cert. denied*, 379 U.S. 835 (1964); *Roland Electrical Co.* v. *Walling*, 326 U.S. 657 (1946).

Appeals also held that "even if [respondent] is not considered a retailer, the contract will still violate the Sherman Act if it provides for resale price maintenance between competitors, regardless of whether these competitors are signatories to the contract" (11a). On this point, too, the Court concluded that the question was for the jury (*i.e.*, whether petitioners were in competition with respondent) (6a-16a).

A second issue tendered to the District Court was framed after the evidence was concluded. Respondent's fair trade contract purported to limit resale to consumers only. Petitioners urged that other retailers refused to sell respondent's products to them because those retailers had signed the fair trade contract or had been informed that diversion would result in their being cut off (DA58-DA62).[2]

The evidence, however, was strongly to the contrary. For example, contrary to petitioners' statement here that each New York retailer of respondent's products was required to execute its fair trade contract, the sole evidence was that respondent had such contracts only with several retailers in the State. Petitioners also point to testimony by their principal, Rothman, that the owner of Brittany Chemists told him, "I signed a contract. If I sell it to anyone else, I will lose the line. * * *" Brittany's owner, Goldman, flatly denied having any such conversation and testified that he told Rothman that he would not sell to him because "I didn't sell any Lanvin to anyone or any other items that I had * * *." In making that decision, Goldman testified, he was not in any way influenced by respondent. Indeed,

2. "DA" references are to respondent's appendix submitted to the Court of Appeals, ten copies of which have been filed together with this brief with the Clerk of this Court.

he could not even remember that he had ever signed respondent's fair trade contract. Moreover, there was ample evidence that respondent had not maintained a policy against diversion, and none of the retailers who refused to sell to petitioners was shown to have been influenced by the customer limitation provision of the fair trade contract or by any other act of respondent.[3]

When petitioners sought to frame the issue in terms of respondent's alleged inducement or coercion of retailers not to divert its goods, the trial judge advised that he would submit the issue to the jury in the form of a special question: Inquiring in the statutory terms whether there had been an agreement, combination or conspiracy in violation of Section 1 of the Sherman Act as alleged in the complaint, he asked, "* * * [W]ho are the co-conspirators?" Petitioners' counsel responded that in this sense the conspiracy was with two named drug stores.[4] The colloquy concluded on this note:

> "The Court: Well, Mr. Siegel, would you then on the basis of what you tell me, say that the question properly to be submitted to the jury would be: Did defendant agree, combine or conspire with Royal and

3. 3a, 22a; DA1-8, 12-13, 18, 23-32, 34-35, 43-49, 51-52, 54-56, 70.

4. "Mr. Siegel: Well, as far as I am concerned, the conspiracy in that sense took place between the Lanvin Corporation, through the use of their contracts with the Royal Drug, to whom they said, 'You cannot sell to Mr. Rothman or anybody else', and he did not want to sell because of the fact that he was told he would lose the line if he did. So there is that coercion on the part of Lanvin with another direct account.

"The Court: Well, then, you are telling me that the evidence as it stands now shows that the conspiracy claimed by the plaintiffs is a conspiracy between Lanvin and Royal?

"Mr. Siegel: And also the Hubert Drug, too, said the same thing" (DA62).

Hubert that Lanvin products sold to Royal and Hubert would not be resold to plaintiff?

"Mr. Siegel: I would say so, yes.

"The Court: You would say so?

"Mr. Siegel: Definitely" (DA63-64).

In charging the jury, the District Court put the special question in this form and carefully instructed as to the "agreement" requisite of Section 1. *Inter alia,* the trial judge charged that "When his products are sold * * * and their ownership passes from the maker, he may not, by agreement with the purchaser, control to whom the purchaser resells the product." Charging in the full language of the statute, the judge explained that petitioners claimed the evidence showed such an "agreement, combination or conspiracy."[5] He developed at length the meaning of that statutory requisite, advising that "the evidence need not show that the members [of a conspiracy] entered into any express or formal agreement or that they directly, by word spoken or in writing, stated between themselves what their object or purpose was to be." The trial judge concluded by advising the jury that a conspiracy is proved by showing that the members "positively or tacitly came to a mutual understanding to accomplish a common practice." When asked whether he had any exceptions to the charge, petitioners' counsel stated, "I do not take any exceptions" (DA67-68).

The jury found for respondent on this second issue. Petitioners then argued on appeal that the District Court

5. He specified, however, that "the plaintiffs do not claim that Janel or Carlton were the objects by name of such conduct, but that Royal and Hubert would not resell except to consumers" and therefore the argued effect was the same (DA67).

erred in failing to instruct the jury that the customer limitation provision in respondent's fair trade contract was a *per se* violation. The Court of Appeals held not only that petitioners had failed to take proper exception to the charge but also that the question whether respondent had in fact limited its retailers' sales of its products was, on the conflicting evidence, within the province of the jury and that the charge given on that issue was proper (16a-18a).

Before the Court of Appeals, petitioners outlined the course of respondent's fair trade proceedings against them in the State court and complained that an injunction had been obtained and thereafter enforced against them in contempt proceedings, with the result that "plaintiff Janel Sales was compelled to pay the sum of $1,430.44 to defendant and plaintiff Carlton Drug, Inc. was compelled to pay the sum of $1,452.93 to defendant." The Court of Appeals declared that, while the District Court had correctly ruled that petitioners were not collaterally estopped by the State court's decision and while those decisions were not binding upon Federal courts so far as interpretation of the McGuire Act, nonetheless "there can be no damages arising from the State court injunction, even if the issuance of it was in error" (5a, n. 2).

ARGUMENT

I

The Court of Appeals interpreted the McGuire Act just as petitioners urge it should be construed and that interpretation is not in conflict with the decision of any other Federal appellate court.

Petitioners declare that at all times it has been their contention that the lawfulness of respondent's fair trading turns upon the question of fact, "Are petitioners and respondent in competition with each other?" They argue that the Court of Appeals erred in stating that "the first question of fact is whether Lanvin is functionally a retailer" and that the remand is thereby improperly "limited to the issue relating to respondent's retail activities" (Petition, pp. 6-7).

Petitioners misconstrue the opinion of the Court of Appeals, which in fact gave them two strings to their bow. Since respondent's several fair trade contracts were executed by retailers, the Court of Appeals held that if respondent is also a retailer, regardless of whether it competes with the signing retailers, its fair trading is not immunized (9a-11a). As a second, independent ground for excepting respondent's fair trading from McGuire Act immunity under paragraph (5) of that statute, the Court also held, "However, even if Lanvin is not considered a retailer, the contract will still violate the Sherman Act if it provides for resale price maintenance between competitors, regardless of whether these competitors are signatories to the contracts" (11a). Thus it is clear that the remand per-

mits petitioners to offer proof of any competition between them and respondent. There is no need, therefore, to grant the writ on the basis of petitioners' unfounded fear that the remand is limited to the question of whether respondent is a retailer.

Petitioners also urge that paragraph (5) of the McGuire Act requires proper construction and clarification by this Court because "the cases referred to in the opinion of the Court of Appeals illustrate the varying constructions . . . now prevalent" (Petition, p. 6). The sole case cited by the Court of Appeals and standing for any of the constructions of paragraph (5) which petitioners find unwarranted was a District Court decision in the Second Circuit. *Johnson & Johnson* v. *Janel Sales Corp.*, 192 F. Supp. 780 (S.D.N.Y. 1961).

The Court of Appeals expressly disagreed with that decision and established as the law of the Second Circuit each and every construction of paragraph (5) for which petitioners contend. Moreover, as the Court of Appeals noted (13a-14a), its interpretation of the statute is squarely supported by *Esso Standard Oil Co.* v. *Secatore's Inc.*, 246 F. 2d 17 (1st Cir.), *cert. denied*, 355 U.S. 834 (1957). There is no conflict in decision or principle with any other Federal appellate court.

II

Upon conflicting evidence, resolved against petitioners by the jury, as to whether any resale customer limitation was effected, the charge (to which no exception was taken) was proper and poses no question of general consequence meriting review by this Court.

Before the Court of Appeals, petitioners contended, based upon *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), that the provision of respondent's fair trade contract purporting to limit resale to consumers only was illegal *per se* and that the jury should have been so instructed. In fact, petitioners never asked for any such charge. Instead they urged that the jury be instructed, "If the defendant *enforced* a prohibition restricting its retail outlets in their choice of customers, such restriction is additionally unlawful"[6]. (Emphasis added). The trial judge omitted this request because it was "covered in substance" (DA66) by the special question agreed to by petitioners and the far more detailed and informative charge heretofore discussed (pp. 5-6, *supra*).

6. Petitioners argue here that the Court of Appeals erroneously imposed "a condition precedent on the application of *Schwinn* * * * that the enforcement of the offending customer limitation clause must be 'firm and resolute'" (Petition, p. 10). All that the Court of Appeals did was to note (17a), in the language of this Court, that Schwinn *had enforced* a resale limitation and that the enforcement was "firm and resolute" while in this case there was conflicting evidence as to any enforcement by respondent. Obviously, a resale limitation provision in a contract does not create a *per se* violation if it is meaningless, is not enforced, does not influence the purchaser's resale or, as here, is not even known to the bulk of purchasers because they have not signed any such contract. Petitioners' own request for a charge recognized that enforcement or adverse effect resulting from the provision was essential. Finally, the jury was never instructed that enforcement must be "firm and resolute."

Until the appeal, petitioners never objected to the procedure followed or claimed that the customer limitation issue as put to the jury ignored any part of their requested charge or their characterization of the evidence. Moreover, petitioners expressly disclaimed any exception to the charge (DA58-DA68). Fed. R. Civ. P. 51. In all the circumstances, the Court of Appeals correctly held that the charge was proper and the jury's verdict for respondent determined the customer limitation issue against petitioners. Moreover, the character of the charge in a particular action is not of such general consequence and import for other litigants as to merit further consideration by this Court.

III

Petitioners are not entitled to any damages arising out of the State court fair trade injunctions.

Petitioners instituted these actions in July, 1963, and the period of damages covered by the trial included the four preceding years. Respondent did not obtain fair trade injunctions against petitioners in the State court until October 31, 1962, and thereafter contempt fines were imposed in early 1963.[7] None of the State court determinations, including the adverse disposition of the McGuire Act contentions upon which petitioners have prevailed in these actions, was carried by petitioners to an ultimate appeal.

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7. See *Lanvin Parfums, Inc.* v. *Carlton Drug, Inc.*, 1962 Trade Cases ¶70,563 (N.Y. Sup. Ct.); *Lanvin Parfums, Inc.* v. *Carlton Drug, Inc.*, 1963 Trade Cases ¶70,645 (N.Y. Sup. Ct.), *affirmed*, 264 N.Y.S. 2d 212 (1st Dep't 1965); *Lanvin Parfums, Inc.* v. *Carlton Drug, Inc.*, 1963 Trade Cases ¶70,686 (N.Y. Sup. Ct.).

The Court of Appeals noted that the District Court had correctly ruled that the State court determinations were not binding upon it and that the Federal courts, not State courts, are the final arbiters in the event of any conflict between them concerning the McGuire Act limitations upon State fair trade laws. At the same time, in view of the remand it was ordering, the Court of Appeals, citing decisions by the Court of Appeals for the Third Circuit,[8] stated that "there can be no damages arising from the state court injunction, even if the issuance of it was in error" (5a, n. 2). Petitioners argue:

> "It should not be the law that a Fair Trader can enforce an unlawful price fixing scheme, even to the point of obtaining substantial contempt of court penalties against petitioners, then exculpate itself from liability to petitioners for its wrongdoing on the incidental ground that state process was employed in the course of the wrongdoing" (Petition, p. 9).

As noted, the State court fair trade enforcement proceedings placed no restraint upon petitioners until the last nine months of the four-year damage period available to them under the statute of limitations. In any event, if "an unlawful price fixing scheme" was thus enforced and if petitioners were thereby injured, they had remedies for avoiding such enforcement and injury by appealing to the highest State court or, if necessary, to this Court[9] for a

8. *Di Gaetano v. Texas Co.*, 300 F. 2d 895 (3d Cir. 1962); *Fiumara* v. *Texaco Inc.*, 204 F. Supp. 544 (E.D. Pa.), *affirmed*, 310 F. 2d 737 (3d Cir. 1962), *cert. denied*, 372 U.S. 976 (1963).

9. 62 Stat. 929, 28 U.S.C. §1257. See *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282 (1921).

correct construction of the McGuire Act and its limitations upon the State fair trade law.

That petitioners cannot claim damages based upon the State court enforcement when they elected not to exhaust available remedies is wholly consonant with principles of sound and orderly jurisprudence (a conclusion underlined by the fact that their damage claims are founded upon contempt fines of approximately $3,000 imposed when they chose to flout State court injunctions). Those principles are even more compelling in the context of antitrust cases, where any contrary result would allow petitioners to accept without protest an adverse lower court decision and then collect three times any damages they might have incurred.

Moreover, petitioners are not deprived of any recovery they might be entitled to even if "damages" arising from the State court injunctions were available to them. The injunctions merely required petitioners to sell at higher prices than they wanted to. Only if those higher prices reduced petitioners' volume of sales and resulting profits could "damage" have been caused by the injunctions enforcing respondent's fair trade prices.

Throughout the progress of these cases, however, it has been petitioners' claim that allegedly because of respondent's antitrust violations they were deprived of access to its goods in sufficient quantities to meet their needs.[10] At the trial, petitioners' sole evidence of damages was to the effect that they had been able to obtain only small percentages of the amount of respondent's goods they could have otherwise sold. With the customer limitation issue

10. See, for example, Petition, pp. 3, 5, 9-11.

finally determined against petitioners, they are now foreclosed from proof of damages on that theory. Consequently, it appears that petitioners' repeated references here to "substantial penalties" for contempt of court (Petition, pp. 3, 9) reveal the sole "damages" they have incurred. Petitioners appear to recognize that unless they are erroneously permitted to recover such "damages" they lack grounds for claiming even the reasonable costs and attorney's fees which the Clayton Act allows only to a claimant who establishes damages. Such circumstances furnish no basis for the exercise of this Court's supervisory powers.

Conclusion

For all of the reasons stated here, respondent urges that the writ should not be granted.

Respectfully submitted,

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